

STATE OF MICHIGAN
COURT OF APPEALS

BRENDA CONLEY, as Personal Representative
of the Estate of CHRISTOPHER CONLEY,
Deceased,

UNPUBLISHED
January 12, 2006

Plaintiff-Appellant,

v

THOMAS BOBZEAN,

No. 257276
Lenawee Circuit Court
LC No. 02-002887-NO

Defendant,

and

JASON CRAWFORD, ROBIN BURKE, JOHN
PAINE, JACK DELAND and CITY OF ADRIAN,

Defendants-Appellees.

Before: Murray, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendants, Jason Crawford, Robin Burke, John Paine, Jack DeLand and the city of Adrian, on plaintiff's claims of their breach of statutory and common law duties owed to decedent, based on his status as an alleged "incapacitated" person in accordance with MCL 333.6501, and violation of duties owed pursuant to 42 USC 1983. We affirm.

Plaintiff contends defendants were negligent by breaching the duty owed to decedent to detain him in protective custody when he was determined to be intoxicated. Plaintiff asserts the failure of defendants to abide by the directives of MCL 333.6501 to secure decedent medical attention constituted the proximate cause of his death and was grossly negligent.

A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). The applicability of governmental immunity is also a question of law reviewed de novo. *Baker v Waste Management of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

MCL 333.6501(1) provides:

An individual who appears to be incapacitated in a public place shall be taken into protective custody by a law enforcement officer and taken to an approved service program, or to an emergency medical service, or to a transfer facility . . . for subsequent transportation to an approved service program or emergency medical services. When requested by a law enforcement officer, an emergency service unit or staff shall provide transportation for the individual to an approved service program or an emergency medical service. This subsection shall not apply to an individual who the law enforcement officer reasonably believes will attempt to escape or will be unreasonably difficult for staff to control.

MCL 333.6104(3) defines a person that is “incapacitated” as being:

[A]n individual, as a result of the use of alcohol, is unconscious or has his or her mental or physical functioning so impaired that he or she either poses an immediate and substantial danger to his or her own health and safety or is endangering the health and safety of the public.

First and foremost, plaintiff has failed to demonstrate that decedent meets the definitional requirements of an “incapacitated” person. Decedent was intoxicated, which was verified by administration of a PBT test. At the time of police involvement, plaintiff fails to demonstrate decedent posed “an immediate and substantial danger” to himself or was “endangering the health and safety of the public.” While decedent had previously been involved in a physical altercation and purported verbal threats, during the time of police interaction decedent was not engaged in actions or behavior that constituted a danger to himself or others. Intervention by defendants to prevent decedent from driving his motor vehicle precluded any implication of decedent being a threat to himself or the public. The mere appearance of intoxication, without concomitant existence of dangerous behavior, is not sufficient to necessitate invocation of MCL 333.6501.

Plaintiff’s assertion of liability with regard to the city of Adrian is premised merely upon a tenuous allegation that the city of Adrian failed to properly discipline or prevent the officers from engaging in wrongful conduct. If it is demonstrated that the officers did not engage in wrongful conduct, no liability can be attributed to the city of Adrian. In addition, this Court has recognized that “a governmental agency is immune from tort liability when ‘engaged in the exercise or discharge of a governmental function.’” *Markis v City of Grosse Pointe Park*, 180 Mich App 545, 557; 448 NW2d 352 (1989), quoting MCL 691.1407(1). Maintaining a police force is a recognized governmental function. *Mack v City of Detroit*, 254 Mich App 498, 500; 658 NW2d 492 (2002). Therefore, the city of Adrian was entitled to immunity from tort liability for activities that are related to the operation of its police force.

Plaintiff contends that defendants, by failing to detain decedent, breached their duty to him and thereby proximately caused his death. To establish a prima facie case of negligence, plaintiff was required to demonstrate: (1) defendants owed a duty to plaintiff; (2) defendants breached that duty; (3) the breach of duty by defendants was a proximate cause of plaintiff’s damages; and (4) plaintiff suffered damages. *Markis, supra* at 558. This Court has previously indicated that a “public official’s duty is owed to the public and not to any specific individual in society.” *Id.* Based on the absence of any discernible duty, plaintiff is unable to demonstrate a prima facie case of negligence.

Defendants correctly assert they are entitled to governmental immunity from tort liability. Defendants were acting in their official capacity and within the course of their employment and the scope of their authority. Importantly, the determination by defendants to offer transport to decedent rather than assume custody of him did not constitute gross negligence and was within the scope of their authority and, therefore, is entitled to immunity.

Defendants were confronted with a decision whether to take decedent into protective custody or assist him to an alternative, safe location. Defendants elected the latter course of conduct. It has been recognized that the course of action elected to be taken by defendants is precisely the type of action that the concept of governmental immunity was designed to protect. *Morse, supra* at 894 n 6.

Plaintiff also contends that defendants' actions, or inaction, constituted gross negligence precluding the applicability of governmental immunity. MCL 691.1407(2)(c) allows for individual immunity for governmental employees as long as their conduct "does not amount to gross negligence that is the proximate cause of the injury or damage." "Gross negligence" is defined within MCL 691.1407(7)(a) as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." This Court has held that to establish the existence of gross negligence:

[S]imply alleging that an actor could have done more is insufficient under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result. However, saying that a defendant could have taken additional precautions is insufficient to find ordinary negligence, much less recklessness. Even the most exacting standard of conduct, the negligence standard, does not require one to exhaust every conceivable precaution to be considered not negligent.

The much less demanding standard of care – gross negligence – suggests, instead, almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks. It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge. [*Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004).]

There is nothing in the conduct of defendants to suggest gross negligence. Defendants precluded decedent from driving. Defendants assured transport of decedent to a location, initiated at the request of decedent's companion, and ascertained their safe arrival at the designated location. The trial court properly concluded that no reasonable person could conclude that defendants' conduct was grossly negligent or was the proximate cause of decedent's injury.

Further, in order to be the proximate cause of an injury, the asserted gross negligence must be "the one most immediate, efficient, and direct cause" preceding the injury. *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000). The physical assault on decedent was the proximate cause of the injury. While the failure of the officers to recognize and address decedent's need for medical treatment may have contributed to the final result, their actions cannot be construed to be the direct cause of the injury sustained.

Additionally, the public-duty doctrine insulates police officers from tort liability for negligent failure to provide police protection unless an individual demonstrates the existence of a special relationship. *Gazette v City of Pontiac (On Remand)*, 221 Mich App 579, 582; 561 NW2d 879 (1997). A special relationship is deemed to exist between a police officer and a plaintiff if the following four elements are met:

- 1) Through either promises or action, there is an assumption by the police officer of an affirmative duty to act on the behalf of the individual who was injured;
- 2) There exists knowledge by the police officer that a failure to act or inaction could cause or lead to harm;
- 3) There is some form of direct contact between the individual injured and the police officer; and
- 4) There is justifiable reliance by the individual on the affirmative undertaking by the police officer. [*White v Beasley*, 453 Mich 308, 320; 552 NW2d 1 (1996).]

Plaintiff has failed to demonstrate the existence of a special relationship between decedent and defendants. Plaintiff is unable to demonstrate that defendants had knowledge that their failure to take decedent for medical intervention would cause or lead to harm. Decedent's injuries were incurred outside the presence of police and did not appear significant. The fact that decedent's injury was not obvious was confirmed by the postmortem evaluation. The affirmative action undertaken to transport decedent to an alternative, safe location was completed without incident, fulfilling any reliance by decedent for actions undertaken on his behalf. Plaintiff is unable to establish tort liability of defendants for any negligent failure to provide police protection through imposition of the special relationship exception. Because defendants did not owe decedent a duty pursuant to the public-duty doctrine, plaintiff's claim of gross negligence is precluded. Without establishment of a duty, negligence cannot be found. *Hill by Burton v Kokosky*, 186 Mich App 300, 302; 463 NW2d 265 (1990).

Plaintiff also presents a strained argument of false imprisonment. While simultaneously asserting negligence for the failure of defendants to place decedent in protective custody, plaintiff contends that the officers wrongfully restricted decedent's liberty during their investigation. False imprisonment is defined as "an unlawful restraint on a person's liberty or freedom of movement." *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 17; 672 NW2d 351 (2003). The elements of false imprisonment include:

- (1) an act committed with the intention of confining another,
- (2) the act directly or indirectly results in such confinement, and
- (3) the person confined is conscious of his confinement. [*Walsh v Taylor*, 263 Mich App 618, 627; 689 NW2d 506 (2004).]

There is no evidence of restraint or confinement of decedent by defendants. Plaintiff complains that decedent was not arrested or taken into protective custody. The only restriction on decedent by police was to preclude use of his motor vehicle based on his intoxicated

condition. They did not preclude him from leaving the scene. Defendants' directive to decedent and his friend to wait in decedent's car does not comprise confinement. Decedent was not required to remain in the vehicle or precluded from exiting it. The transport of decedent in a patrol car does not comprise a confinement that rises to the level of false imprisonment. Decedent's friend, with decedent's tacit concurrence, identified a location they wished to be transported to and voluntarily entered the police vehicle for that purpose. Plaintiff's claim falls short of demonstrating any coercion by defendants or impingement of bodily restrictions upon decedent. As such, there exists no basis to support plaintiff's contention of false imprisonment.

Plaintiff amended her complaint to include a claim pursuant to 42 USC 1983, which provides for liability for individuals who violate a person's constitutional rights under color of law. *Davis v Wayne County Sheriff*, 201 Mich App 572, 576; 507 NW2d 751 (1993). This Court has noted, "[t]he statute creates no substantive rights, but instead merely supplies a remedy for deprivation of rights created by other laws." *Id.* In order to sustain an action in accordance with §1983, a plaintiff must demonstrate that:

- (1) the defendant acted under color of state law;
- (2) the conduct deprived the plaintiff of constitutional rights; and
- (3) the deprivation of rights occurred without due process of law. [*Markis, supra* at 553, citing *Jones v Sherrill*, 827 F2d 1102, 1104 (CA 6, 1987).]

A cause of action brought in state court, in accordance with 42 USC 1983, requires this Court to conduct a review of federal law interpreting the federal statute. *Markis, supra* at 553. The facts are to be viewed in a light most favorable to plaintiff and must demonstrate that a constitutional violation has occurred. If a violation is identified:

[T]he court must then determine "whether the violation involved 'clearly established constitutional rights of which a reasonable person would have known.'" If no constitutional violation occurred, the defendant has qualified immunity from liability. "Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.'" [*Dean v Childs*, 262 Mich App 48, 53-54; 684 NW2d 894 (2004) (citations omitted), rev'd in part on other grds 474 Mich 914 (2005).]

Defendants rely on *DeShaney v Winnebago Co Dep't of Social Services*, 489 US 189; 109 S Ct 998; 103 L Ed 2d 249 (1989), to support their contention that plaintiff has failed to demonstrate a constitutional violation. In *DeShaney*, the United States Supreme Court rejected a parent's argument that the defendant's failure to protect a minor child from his father's abusive and violent behavior, which the agency was aware of or should have been aware of, violated the minor child's due process rights. The Supreme Court determined that the Due Process Clause did not mandate a state to protect its citizens lives, liberty and property against invasion by private individuals. Nor did the Court require a state to guarantee a minimum level of safety and security to its citizens. *DeShaney, supra* at 195-196. Two exceptions to this general rule are recognized. The first exception encompasses situations in which the government places a person into custody, preventing him from protecting himself, resulting in the creation of a special relationship. The formation of this special relationship is deemed to place the government under

a “heightened duty” to protect the individual placed in custody. The second exception, involves the imposition of a governmental duty under the “state-created danger theory,” which occurs when the government either created the danger or engaged in behavior or actions which rendered the person more vulnerable to the danger. *Id.* at 198-201; *Dean, supra* at 54.

Plaintiff’s cause of action must fail because the “Due Process Clause does not confer an affirmative right to governmental aid, including protective services.” *Dean, supra* at 54. In general, “[t]he affirmative duty to protect arises not from the State’s knowledge of the individual’s predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.” *DeShaney, supra* at 200. Plaintiff’s claim cannot meet the first exception to *DeShaney*, because decedent was not in custody at the time of his death. Plaintiff’s allegation that the officers’ detention of decedent during the questioning of witnesses and their transport of him to another location comprised a restriction on his freedom and prevented his ability to secure medical attention is without merit. At no time was decedent searched, handcuffed or physically restricted. Even after being transported to another location by police, decedent did not seek medical attention. The transport of decedent and his companion, was at their request, and did not involve any form of coercion.

Plaintiff contends applicability of the state-created danger exception, by generally asserting the city of Adrian had improperly or not thoroughly trained its officers in policies regarding mandatory arrests for domestic violence incidents. To establish a claim in accordance with the state-created danger theory, plaintiff must demonstrate:

(1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff wherein the state’s actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and (3) the state knew or should have known that its actions specifically endangered the plaintiff. [*Dean, supra* at 55, citing *Cartwright v Marine City*, 336 F3d 487, 493 (CA 6, 2003).]

The Sixth Circuit has ruled that a failure to act cannot form an affirmative act to support a state-created danger. *Dean, supra* at 55, citing *Sargi v Kent City Bd of Ed*, 70 F3d 907, 912-913 (CA 6, 1995). Plaintiff has failed to establish an affirmative act on the part of defendants. Accordingly, defendants cannot be deemed liable, pursuant to §1983, for their failure to secure decedent medical treatment.

Under specific circumstances, municipal liability in accordance with §1983 has been recognized by the United States Supreme Court, *Canton v Harris*, 489 US 378, 380; 109 S Ct 1197; 103 L Ed 2d 412 (1989), for the failure of a municipality to train its employees. In *Canton*, the Supreme Court determined that “the inadequacy of police training may serve as the basis for §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.” *Canton, supra* at 388. The problem for plaintiff is her failure to plead any deficiency in training or to demonstrate that the alleged inadequate training was representative of a “city policy,” which has been described as involving:

[I]n the light of the duties assigned to specific officers of employees the need for more or different training is so obvious, and the inadequacy so likely to result in

the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury. [*Dean, supra* at 56, quoting *Canton, supra* at 390.]

Plaintiff has not demonstrated that this case comprises a failure by defendants to effectuate the city of Adrian policies for domestic violence complaints. Decedent's injury was not the product of a domestic assault mandating the placement of decedent into custody. In addition, unlike the plaintiff in *Canton*, decedent was not in police custody. While liability has been imposed in noncustodial situations, the standard required is higher than deliberate indifference. In noncustodial situations, a plaintiff is required to demonstrate an affirmative intent to cause harm. *Sacramento v Lewis*, 523 US 833, 854; 118 S Ct 1708; 140 L Ed 2d 1043 (1998); *Claybrook v Birchwell*, 199 F3d 350, 359 (CA 6, 2000). To impose §1983 liability in noncustodial situations, plaintiff must demonstrate that the actions of the governmental entity were malicious, intended to harm or to worsen the condition. *Id.* Plaintiff has only pled "deliberate indifference," which is insufficient to sustain her federal claim.

Affirmed.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly